

First Healthcare Corporation d/b/a Hillhaven Kona Healthcare Center and Laborer's International Union of North America, Local 368, AFL-CIO, Petitioner and Hawaii Nurses' Association, Collective Bargaining Association, Petitioner. Cases 27-RC-7659 (Formerly 37-RC-3724) and Case 27-RC-7660 (Formerly 37-RC-3725)

July 7, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On May 8, 1996, the Acting Regional Director for Region 27 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found, among other things, that the Employer's licensed practical nurses (LPNs) and registered nurses (RNs) were not statutory supervisors within the meaning of Section 2(11) of the Act, and that a separate technical unit consisting of LPNs was appropriate. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision. By Order dated June 6, 1996, the Board granted the Employer's request for review solely with respect to the Acting Regional Director's finding that the LPNs' and RNs' role in preparing evaluations of certified nursing assistants (CNAs) does not establish supervisory authority. The election was conducted as scheduled on June 6, 1996, and the ballots were impounded.

Having carefully considered the entire record and the Employer's brief on review, the Board concludes, contrary to the Acting Regional Director, that the LPNs and RNs are supervisors as defined in Section 2(11) because of their role in preparing evaluations of CNAs that directly affect CNAs' employment status. Thus, the evidence establishes that the probationary and annual evaluations of each CNA are, in most cases, completed by the LPN or RN who works most closely with the CNA.¹ Using management prepared written guidelines, the LPN or RN, without consultation with higher management, rates the employee on 10 factors, assigning a numerical score from 1 to 5, and providing a brief written comment on each factor.²

¹ Evaluations are completed at 30-day, 60-day, 90-day, and 6-month intervals for new employees, and annually thereafter. The 30- and 60-day evaluations do not lead to pay increases, while the 90-day and annual evaluations may lead to an increase.

² The guidelines set forth each factor to be evaluated and the specific meaning of the numerical rating as it pertains to that factor.

If the average rating is 3.0-4.0, the employee is eligible for a pay increase of 3 percent. If the average is above 4.0, the employee is eligible for a 6-percent increase. As stated on the evaluation form, if the rating is below 3.0, that employee is put on probation and evaluated again in 30-60 days; continued poor performance may result in termination. Although the LPNs and RNs are not necessarily uniformly aware of the specific wage increase for which each employee is eligible as a result of a rating, they are aware that their evaluations have an effect on the employee's raise or employment status.

The LPNs and RNs are expected to meet with the CNAs to review the evaluations, although this does not always occur. The LPNs and RNs do not need the approval of higher management before issuing the evaluations or showing an evaluation to and meeting with a CNA. The administrator testified that in order for the evaluation to be considered complete, it must be signed by the director of nursing (DON).³ In addition, the administrator must sign the form before a pay raise is effectuated. However, there is no evidence that either the DON or administrator independently investigates the basis for the evaluations or changes the numerical ratings assigned. Significantly, the administrator testified that he signs the evaluation as an "oversight" function, that he has never changed an evaluation,⁴ and that during the time he has been with the Employer, no employee has been denied a wage increase after receiving the appropriate rating. Thus, the numerical ratings given by the LPNs and RNs in their evaluation of the CNAs directly determine the amount of the CNAs' wage increases.

Based on the above, we find, contrary to the Acting Regional Director, that the Employer's LPNs and RNs are supervisors as defined in Section 2(11) of the Act. See *Bayou Manor Health Center*, 311 NLRB 955 (1993). In *Bayou*, the Board found that the employer's LPNs were statutory supervisors solely because the evaluations they completed affected the salaries of the employer's nurses aides, as there was a direct correlation between the evaluations and the merit increases or

The nurse may adjust the numerical ratings by fractions to reflect more accurately the CNA's performance.

³ The administrator testified that there are instances where CNAs have received pay increases without the signature of the DON on the evaluation. However, assuming, without deciding, that this has occurred, we note that this appears to run counter to the general practice.

⁴ Several nurses also testified that their evaluations have never been changed by members of management.

bonuses awarded.⁵ See also *Health Care & Retirement Corp.*, 310 NLRB 1002, 1006-1007 (1993).⁶

⁵ We disagree with the Acting Regional Director that this case is distinguishable from *Bayou* because in *Bayou*, unlike here, the evaluation was placed directly in the employee's personnel file without review of the evaluation scores. In this regard, we again note there is no evidence that the DON or administrator independently reviews or changes the evaluations.

Member Higgins would find supervisory status even if the DON or administrator added an independent view to the recommendation of the nurse.

We also disagree with the Director's finding that "a raise can and has been given without the completion of an evaluation." The only evidence in the record which arguably supports the Director's finding is a 6-month evaluation of CNA Linda Crighton dated April 23, 1995. At the bottom of the evaluation the box titled "No Increase" is checked and underneath the box is written "was raised on 4-3-95 to 7.15 which is the 6 month step." The handwriting of this statement is clearly different from that of the supervisor, but there is no indication on the form or in record testimony as to who wrote the statement. Nor is there any record testimony explaining the circumstances regarding Crighton's alleged pay increase 3 weeks before the evaluation. On this record, the Director's finding is speculative at best.

⁶ We note that the Acting Regional Director's reliance on *Providence Hospital*, 320 NLRB 717, 735 (1996), is misplaced. In *Provi-*

Accordingly, the Acting Regional Director's decision is reversed, the Direction of Election in Case 27-RC-7660 is vacated, and the case is remanded to the Regional Director for further appropriate action consistent with the findings herein.

dence, a health staff nurse was found not to be a statutory supervisor where she determined by application of a formula and with involvement from the personnel department, the rate of pay for interim jobs of program participants with whom she worked. There was no mention of performance evaluations and wage increases based on numerical ratings.

Although Member Higgins does not endorse *Providence Hospital*, he agrees that the case is distinguishable.